IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12295

National Brass Works, Incorporated,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PACIFIC MILLS AS AMICUS CURIAE.

Randolph E. Paul,
1614 Eye Street, N. W.,
Washington, D. C.

Louis Eisenstein
and
Louis F. Oberdorfer
Of Counsel

Press of Byron S. Adams, Washington, D. C.

TABLE OF CONTENTS.

Page

I. Introduction 1

A. Statement of Pacific Mills' Interest 1

B. The Tax Court Decision 2

II. Argument 5

A. Allowance of the Deduction Would Not Mitigate a Penalty Nor Frustrate a Sharply Defined National Policy Proscribing Particular Types of Conduct 5

1. *The Original Provisions of Section 205(e) of the Emergency Price Control Law* 6

2. *The Administrator's Enforcement Policy* .. 8

3. *The 1944 Amendment to Section 205(e) of the Price Control Law* 10

B. The Court Decisions Do Not Sustain the Commissioner's Contention That Overcharge Payments Are Non-Deductible Penalties 19

C. Petitioner's Payment of the Overcharge Was an Ordinary and Necessary Business Expense 21

D. The Penalty Doctrine Should Not Be Extended to This Case 22

E. Disallowance of Petitioner's Deduction Would Affirmatively Impose a Penalty 30

TABLE OF CITATIONS.

Cases:

Adams v. *United States*, 319 U. S. 312 9

Alexander Gravel Co. v. *Commissioner*, 95 F. 2d 615. 21

Amoto v. *Porter*, 157 F. 2d 719 ....19, 20

Barksdale v. *Fleming*, 160 F. 2d 494 9

Bonnie Bros. v. *Commissioner*, 15 B. T. A. 1231 23

Bowles v. *Farmers National Bank of Lebanon, Ky.*, 147 F. 2d 425 19

Burnet v. *Guggenheim*, 288 U. S. 280 20

Page

Burroughs Building Material Co. v. *Commissioner*, 47 F. 2d 178 .... 3, 23, 25, 26, 29, 31
Chicago, Rock Island & Pacific Ry. Co. v. *Commissioner*, 47 F. 2d 990, *Cert. denied*, 284 U. S. 618... 23, 31, 32
Commissioner v. *Brown*, 54 F. 2d 563.............. 32
Commissioner v. *Heininger*, 320 U. S. 467....3, 4, 5, 6, 20, 21, 22, 23, 24, 26, 27, 30, 31, 33, 34
Commissioner v. *National Carbide Corporation*, 167 F. 2d 304, *aff'd*, 336 U. S. 422.................. 20
Commissioner v. *Wilcox*, 327 U. S. 404............21, 33
Crary v. *Porter*, 157 F. 2d 410....................9, 19
Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349 9
Fleming v. *Elliott*, 163 F. 2d 215.................. 19
Foss v. *Commissioner*, 75 F. 2d 326.............. 28
Garibaldi & Cuneo v. *Commissioner*, 9 T. C. 446.....2, 3
Gould Paper Co. v. *Commissioner*, 72 F. 2d 698....23, 25
Great Northern Railway Co. v. *Commissioner*, 8 B.T.A. 225, *aff'd*, 40 F. 2d 372, *cert. denied*, 282 U. S. 855 ....3, 23, 24, 25, 32
Hecht Co. v. *Bowles*, 321 U. S. 321................ 21
Helvering v. *Griffiths*, 318 U. S. 371................ 11
Helvering v. *Hammel*, 311 U. S. 504................ 20
Helvering v. *Hampton*, 79 F. 2d 358..............23, 28
Helvering v. *Northwest Steel Rolling Mills*, 311 U. S. 46 20
Helvering v. *Stockholms Enskilda Bank*, 293 U. S. 84.. 20
Helvering v. *Superior Wines & Liquors, Inc.*, 134 F. 2d 373 ....3, 23, 26, 31, 32
Higgins v. *Commissioner*, 312 U. S. 212............ 20
Higgins v. *Smith*, 308 U. S. 473..................32, 33
Howard v. *Commissioner*, 22 B.T.A. 375........... 28
International Shoe Co. v. *Commissioner*, 38 B.T.A. 81 28
Kessler v. *Fleming*, 163 F. 2d 464..............6, 19, 20
Kornhauser v. *United States*, 276 U. S. 145......... 21
Longhorn Portland Cement Co. v. *Commissioner*, 3 T.C. 310, *rev'd in part*, 148 F. 2d 276, *cert. denied*, 326 U. S. 728...............................23, 31
McDonald v. *Commissioner*, 323 U. S. 57........... 22
Mulford v. *Smith*, 307 U. S. 38...................... 28

Page

National Outdoor Advertising Bureau v. *Helvering*, 89 F. 2d 878 .... 23, 25, 26
Porter v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 .... 19, 29
Porter v. *Elliott*, 69 F. Supp. 652, *aff'd sub nom Fleming* v. *Elliott*, 163 F. 2d 215 19
Porter v. *Montgomery*, 163 F. 2d 211 19
Porter v. *Warner Holding Co.*, 328 U. S. 395 .... 6, 7
Jerry Rossman Corporation v. *Commissioner*, 10 T.C. 468, rev'd, 175 F. 2d 711, 1, 3, 4, 6, 9, 10, 18, 22, 23, 27
Scioto Provision Co. v. *Commissioner*, 9 T. C. 439 .. 2, 3, 4, 29
Standard Oil Co. v. *Commissioner*, 129 F. 2d 363 3
Textile Mills Securities Corp. v. *Commissioner*, 314 U. S. 326 22
Tyler v. *United States*, 281 U. S. 497 33
United States v. *Congress of Industrial Organizations*, 335 U. S. 106 11
United States v. *Lovett*, 328 U. S. 303 11
United States v. *MacDaniel*, 7 Pet. 1 9
United States v. *Memphis Cotton Oil Co.*, 288 U. S. 62 20
United States v. *Murray*, 75 F. Supp. 216 19
United States v. *Sullivan*, 274 U. S. 259 21
Universal Atlas Cement Company v. *Commissioner*, 171 F. 2d 294 23
Ward v. *Rice*, 29 F. Supp. 714 20
Welch v. *Helvering*, 290 U. S. 111 .... 21, 28
Woods v. *Stone*, 333 U. S. 472 9
Yakus v. *United States*, 321 U. S. 414 5

STATUTES:

Act of June 30, 1944, 58 Stat. 640, Sec. 108(b), 50 U.S.C.A., App. Sec. 925(e) 10
Agricultural Adjustment Act of 1938, 52 Stat. 48, Sec. 314, 7 U.S.C.A. Sec. 1314 28
Emergency Price Control Act of 1942, 56 Stat. 23 .. 5, 6, 27, 32
58 Stat. 632, 50 U.S.C.A. App. Sec. 901, *et seq.* . 5
Section 1(a), 50 U.S.C.A. App. Sec. 901(a) 5
Section 4(a), 50 U.S.C.A. App. Sec. 904(a) 5, 29

Page

Section 205(a), 50 U.S.C.A. App. Sec. 925(a) . . . 7
Section 205(b), 50 U.S.C.A. App. Sec. 925(b) . . . 7
Section 205(e), 50 U.S.C.A. App. Sec. 925(e), 6, 7, 8, 9, 11, 18, 19
Section 205(f), 50 U.S.C.A. App. Sec. 925(f) . . . 7

Hours of Service Law, 39 Stat. 722, 45 U.S.C.A. Sec. 66 . . . 24, 31, 32

Internal Revenue Code:
Section 23(a)(1)(A) . . . 3, 22, 24
Section 2857 . . . 31

Safety Appliances Act, 36 Stat. 299, 45 U.S.C.A. Sec. 13 . . . 24

Safety-Appliance Law, 27 Stat. 532, 29 Stat. 85, 45 U.S.C.A. Sec. 6, 36 Stat. 299, 45 U.S.C.A. Sec. 13 . . 31

Stabilization Act of 1942, 56 Stat. 767, 50 U.S.C.A. App. Sec. 955(a) . . . 7, 34

Stabilization Extension Act of 1944, 58 Stat. 632, 50 U.S.C.A. App. Sec. 925(e) . . . 11, 17

Transportation of Live Stock Law, 34 Stat. 608, 36 Stat. 1167, 45 U.S.C.A. Sec. 74 . . . 31, 32

Quarantine Act, 37 Stat. 318, 7 U.S.C.A. Sec. 163 . . 31, 32

Quarantine Act concerning Cattle and Poultry, 23 Stat. 32, 21 U.S.C.A. Sec. 117 . . . 32

Miscellaneous:

90 Cong. Rec.:
P. 5375-5384 . . . 11, 12, 13, 15
P. 5435-5451 . . . 11, 16
P. 5645 . . . 16
P. 5882-5883 . . . 16
P. 5886-5887 . . . 11, 16, 17

Cavers, The Simplification of Government Regulations, 8 Fed. Bar J., 339 (1947) . . . 22

19 Consol. Laws, N.Y., Sec. 341 (McKinney) . . . 31

Davis, *Administrative Rules—Interpretative Legislative, and Retroactive*, 57 Yale L. J. 919, 936 . . . 9

G.C.M. 24810, C.B. 1946-1, p. 55 . . . 30

Note, 54 Harv. L. Rev. 852 . . . 22

Hearings Before the Senate Banking and Currency Committee on S. 1764, 78th Cong., 2d Sess. . . . 8, 11

Page

Hearings Before the Senate Banking and Currency Committee on S. J. Res. 30, 79th Cong. 1st Sess.....8, 9
H. R. 4941, 78th Cong., 2d Sess.................8, 11, 16
H. R. Rep. No. 1366, 78th Cong., 2d Sess............ 8
H. R. Rep. No. 1698, 78th Cong., 2d Sess............ 16
I. T. 3530, C. B. 1942-1, p. 43 28
I. T. 3627, C. B. 1943, p. 111......................2, 29
I. T. 3799, C. B. 1946-1, p. 56 ....2, 29
Sen. Rep. No. 922, 78th Cong., 2d Sess. 8, 11, 29
Sen. Rep. No. 931, 77th Cong., 2d Sess. 8
S. 1764, 78th Cong., 2d Sess. 8, 10, 11, 13, 14, 16
Treasury Regulations 111:
Section 29.23(a)-1 22
20 Tex. Civ. Stat., Art. 7436......................... 31

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12295

National Brass Works, Incorporated,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PACIFIC MILLS AS AMICUS CURIAE.

I.

INTRODUCTION

A. Statement of Pacific Mills' Interest

We submit this brief *amicus curiae* because this Court's decision may vitally affect the interests of Pacific Mills.

Pacific Mills is a Massachusetts corporation whose principal office and place of business are situated at 140 Federal Street, Boston, Massachusetts. In computing its income tax and excess profits tax for the calendar year 1944 Pacific

Mills deducted a payment of $2,065,842.02 made in that year to the Office of Price Administration. Pacific Mills made the payment in settlement of an O.P.A. complaint alleging that Pacific Mills had overcharged its customers in that amount. Pacific Mills' officers were firmly convinced that the Company had not violated any price control statute or regulation. Nonetheless they decided to settle and pay the Price Administrator an amount not exceeding the alleged overcharges. They did so in order to avoid protracted litigation and unfavorable publicity, and in reliance upon promises by O.P.A. that revised regulations would ratify Pacific Mills' prior interpretations reflecting its principal differences with O.P.A. The revised regulations were later promulgated. A deficiency letter of August 10, 1948, disallowed the deduction of $2,065,842.02 claimed for 1944, and Pacific Mills has duly filed a petition with the Tax Court contesting the asserted deficiency.

B. The Tax Court Decision

The Tax Court's memorandum decision against the taxpayer in this case relies solely upon three previous Tax Court decisions. *Scioto Provision Co.* v. *Commissioner,* 9 T.C. 439 (1947); *Garibaldi & Cuneo* v. *Commissioner,* 9 T.C. 446 (1947); and *Jerry Rossman Corporation* v. *Commissioner,* 10 T.C. 468 (1948), *rev'd,* 175 F. 2d 711 (C.A. 2, 1949).[1] These decisions, in turn, had approved two rulings by the Commissioner of Internal Revenue. I.T. 3627, C.B. 1943, p. 111; I.T. 3799, C.B. 1946-1, p. 56. The Commissioner had ruled that if a taxpayer charged over-the-ceiling prices and then paid the overcharge to the Price Administrator, the payment was a penalty and hence not deductible as an ordinary and necessary business expense, no matter how innocent or inadvertent the overcharge was.[2]

---

[1] The Tax Court decided the *Rossman* case for the Government by a bare 9-7 majority. On appeal the decision was unanimously reversed.

[2] On the other hand, the Commissioner ruled that payments made by violators to the consumers themselves were deductible. I.T. 3627, *supra.*

Although the Tax Court cited three cases as authority for its decision here, only one of the three cases—the *Scioto Provision* case—attempted a reasoned defense of the Commissioner's rulings. In the *Garibaldi & Cuneo* case the Tax Court more or less assumed its conclusion; and in the *Rossman* case the Tax Court simply considered the *Scioto* case essentially indistinguishable.[3] Since the Tax Court's decision in this case the Court of Appeals for the Second Circuit has unanimously reversed the Tax Court's decision in the *Rossman* case. *Jerry Rossman Corporation* v. *Commissioner, supra.* And in reversing the Tax Court, the Second Circuit has completely destroyed the rationale on which the Tax Court and the Commissioner sought to rely in this case.

The Tax Court's decisions and the Commissioner's rulings tacitly acknowledge that, but for the notion that any payments to O.P.A. are penalties, they are clearly deductible as ordinary and necessary business expenses. Internal Revenue Code, Section 23(a) (1)(A).[4] However, in its *Scioto* decision the Tax Court, like the Commissioner, invoked a number of lower court decisions holding generally that penalties are not deductible because the deduction would in effect mitigate the penalty.[5] In order to buttress its conclusion the Tax Court at the same time invoked the Supreme Court's decision in *Commissioner* v. *Heininger,* 320 U. S. 467 (1943). We believe, as the Second Circuit has persuasively indicated in the *Rossman* case, that the Tax Court misapplied the so-called penalty decisions and misinterpreted the *Heininger* decision.

In the *Heininger* case the Supreme Court held that legal expenses incurred in resisting a postal fraud order are de-

---

[3] According to the Tax Court, the only difference between the two cases was that in the *Scioto* case O.P.A. ''had asserted a claim for treble damages,'' whereas in the *Rossman* case ''no claim had been asserted against the petitioner and no violation of the regulations had been charged against it.'' *Jerry Rossman Corp.* v. *Commissioner, supra,* at 472.

[4] See further p. 21, *infra.*

[5] See, e.g., *Great Northern Railway Co.* v. *Commissioner,* 40 F. 2d 372 (C.A. 8, 1930); *Burroughs Building Material Co.* v. *Commissioner,* 47 F. 2d 178 (C.A. 2, 1931); *Standard Oil Co.* v. *Commissioner,* 129 F. 2d 363 (C.A.7, 1942); *Helvering* v. *Superior Wines & Liquors, Inc.,* 134 F. 2d 373 (C.A.8, 1943).

ductible as ordinary and necessary business expenses though the order is eventually sustained. Mr. Justice Black emphasized in his opinion that the "language of §23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." 320 U. S. at 474. In addition he observed that the Commissioner, the Tax Court and the Federal Courts have at times "narrowed the generally accepted meaning of the language used in §23(a) in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct." 320 U. S. 467, 473. The Tax Court's *Scioto* opinion quoted this statement and then noted that our national price control policy was "the prevention of inflation . . . of vital importance to the prosecution of the war." *Scioto Provision Co., supra,* at 445. The Tax Court, accordingly, disallowed the deduction in order to protect what it considered a " 'sharply defined' national policy 'proscribing particular types of conduct.' " If the deduction were allowed, the Tax Court reasoned, there would be "partial mitigation of the penalty" and this mitigation "would be against public policy." *Ibid.*

However, the Tax Court reached its conclusion without a careful analysis and a proper understanding of the "sharply defined" national price control policy "proscribing particular types of conduct." In reversing the Tax Court's *Rossman* decision, the Second Circuit fully exposed the frail reasoning reflected by the Commissioner's rulings and ratified in the *Scioto* decision. The Commissioner and the Tax Court simply assumed that in disallowing the claimed deduction of otherwise allowable business expenses, they were necessarily preventing the mitigation of a penalty and thereby necessarily protecting some "sharply defined" national policy. Actually the Commissioner and the Tax Court did something quite different. They did not forestall the mitigation of any penalty because the return of an overcharge was not the payment of a penalty. And in preventing the deduction they not only failed to protect, but even

frustrated, the "sharply defined" policy residing in the Price Control Act. For here, as in the *Heininger* case, in disallowing the deduction of the returned overcharge, the Commissioner and the Tax Court affirmatively attached "serious punitive consequences" which Congress and the Price Administrator painstakingly refused to impose. See *Commissioner* v. *Heininger, supra,* at 474.

II.

ARGUMENT

A. Allowance of the Deduction Would Not Mitigate a Penalty Nor Frustrate a Sharply Defined National Policy Proscribing Particular Types of Conduct

Undoubtedly the underlying purpose of the Emergency Price Control Act of 1942 was the prevention of inflation and its innumerable consequences. See *Yakus* v. *United States,* 321 U. S. 414, 423 (1944). See also Emergency Price Control Act of 1942, Section 1(a), 56 Stat. 23 (1942), 58 Stat. 632 (1944), 50 U.S.C.A. App §901(a) (1944). In order to implement this purpose Section 4 (a) of the Emergency Price Control Act made it unlawful "for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity" in violation of any order or regulation appropriately established by the Administrator of the Office of Price Administration.[6]

This basic provision, however, did not reflect a "sharply defined" national policy which indiscriminately imposed serious punitive consequences. See *Commissioner* v. *Heininger, supra,* at 473, 474. Indeed the Supreme Court's decision in *Commissioner* v. *Heininger, supra,* expressly requires us to look beyond the question whether a taxpayer's expense was incurred because of unlawful conduct, whether merely alleged or finally established. As the *Heininger* opinion emphasizes, courts are "not required to regard"

[6] 56 Stat. 28 (1942), 50 U.S.C.A. App. § 904(a) (1944).

the unlawful character of a taxpayer's conduct "as a rigid criterion" of deductibility. 320 U. S. at 475. Instead the *Heininger* opinion focuses upon the details of the specific consequences which Congress has attached to a particular type of proscribed conduct. 320 U. S. at 473, 474. And as the *Heininger* opinion indicates, those details must be thoroughly analyzed before narrowing "the generally accepted meaning of the language used in §23(a)." *Id.* at 473, In each case, as Judge Learned Hand has put it, the allowance of a deduction "depends upon the place of sanctions in the scheme of enforcement of the underlying act." *Jerry Rossman Corporation* v. *Commissioner, supra,* at 713. In this case it is the remedial and enforcement provisions of the Emergency Price Control Act and the pattern of its administration which "sharply" define the relevant public policy.

1. The Original Provisions of Section 205(e) of the Emergency Price Control Law

Section 205 of the Price Control Act of 1942 provided a full panoply of remedies. "In the Emergency Price Control legislation Congress was as much concerned with remedies as with substantive prohibitions. It knew that effectiveness of the latter depended altogether upon the scheme for enforcement. Accordingly, both in the original Act and in later amendments, it covered the matter of remedies in the greatest detail and precision . . . It is not excessive to say that perhaps no other legislation in our history has equalled the Price Control Act in the wealth, detail, precision and completeness of its jurisdictional, procedural and remedial provisions. . . . The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared. . . ." Rutledge, J., in *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 403-04 (1946). See also *Kessler* v. *Fleming,* 163 F. 2d 464, 466 (C.A. 9, 1947). Nowhere do the enforcement sections of the Price Control Act suggest any extra or spe-

cial tax liability as one of the varieties of remedies to be visited upon O.P.A. law violators.[7]

Section 205 of the Act authorized criminal sanctions, injunctions and revocable licenses as means of enforcing price control policy. Any person who wilfully violated Section 4 of the Act was subject, upon conviction, to a maximum punishment of two years' imprisonment and $5,000 fine.[8] Section 205(a) authorized the Administrator to seek, and the Federal Courts to grant, broad equitable remedies enjoining violations.[9] Section 205(f) authorized the Administrator to require licenses which could be revoked by court order in the event of price control violation, thereby effectively terminating the licensee's business.[10]

Section 205(e) authorized consumers and the O.P.A. Administrator to bring civil actions.[11] As originally enacted that Section declared that if a sale violated a maximum price regulation, the purchaser "for use or consumption other than in the course of trade or business" could sue the seller "either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."[12] If a violation occurred and the purchaser was not entitled to sue, the Act authorized the Administrator to "bring such action under the subsection on behalf of the United States." Thus the Act authorized, but did not require, the Administrator to bring an action for treble the amount of the overcharges where the purchaser was not entitled to sue. And the Administrator could bring an action, identical to the consum-

---

[7] But compare Section 6(a) of the Stabilization Act of 1942, 50 U.S.C.A. App. §965(a), where Congress specifically authorized the disallowance, for income tax purposes, of the deduction of salaries paid in violation of that Act.

[8] Section 205(b), 56 Stat. 23,33 (1942), 50 U.S.C.A. App. §925(b) (1944).

[9] 56 Stat. 23,33 (1942), 50 U.S.C.A. App. §925(a) (1944). This provision authorized the Administrator to enforce the restitution of excessive rentals to tenants. *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946).

[10] 56 Stat. 23, 33 (1942), 50 U.S.C.A. App. §925(f) (1944).

[11] 56 Stat. 23,34 (1942).

[12] 56 Stat. 23,34 (1942).

er's action, only if the consumer was not entitled to sue. See Sen. Rep. No. 931, 77th Cong., 2d Sess. (1942) 8, 9-10, 26.

2. *The Administrator's Enforcement Policy*

As administration of the Emergency Price Control Act proceeded, resentment against it generated and increased. In 1944 some of the opposition to O.P.A. centered on the provisions of Section 205(e) authorizing treble damage actions by consumers and the Administrator. By April, 1944, the Congress was considering bills to amend the provisions of Section 205(e). A Senate bill proposed limitation of liability in civil actions to "not less than one and one-half and not more than three times the amount of the overcharge." Section 108(a), S. 1764, 78th Cong., 2d Sess. (1944); see also Section 7, H.R. 4941, 78th Cong., 2d Sess. (1944); Sen. Rep. No. 922, 78th Cong., 2d Sess. (1944). A House Committee proposed that civil judgments be limited to the face amount of the proved overcharges. H.R. Rep. No. 1366, 78th Cong., 2d Sess. (1944).

On April 1, 1944, Chester Bowles, then Administrator of the Office of Price Administration, addressed a letter to Senator Wagner, Chairman of the Senate Committee studying the proposed amendments. Mr. Bowles' letter protested any revision which would authorize a court to award a civil judgment for less than triple the amount of the overcharges. Mr. Bowles emphasized that "The most persuasive argument for the change is to protect innocent violators from excessive damages. *Such protection is obviously desirable and it has been our policy to adjust cases involving innocent violations by payment of merely the amount of the overcharge. Congress gave the Administrator discretion to decide into (sic) what cases treble damage actions should be brought. That discretion has been exercised and will in the future be exercised to avoid undue hardship in deserving cases.*" *Hearings before the Senate Banking and Currency Committee on S. 1764,* 78th Cong., 2d Sess. (1944) 1415, 1417. (Italics supplied.) See also *Hearings before the Senate*

Banking and Currency Committee on S. J. Res. 30, 79th Cong., 1st Sess. (1945) 61, 89.

The Administrator's interpretation of Section 205(e) and his consistent administrative practice simply and clearly expressed and executed a sharply defined national policy on innocent overcharges. See *Adams* v. *United States,* 319 U. S. 312, 314 (1943); *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 352 (1941).[13] Where overcharges were innocent or inadvertently collected, the overcharger merely surrendered them and no penalty was imposed. If the Administrator thought that the violation was wilful, he sought a penalty in addition to the overcharge, or he invoked the more drastic criminal sanctions. In other words, the Administrator enforced national policy by siphoning the excessive receipts out of circulation. See *Barksdale* v. *Fleming,* 160 F. 2d 494, 495 (C.A. 8, 1947); *Crary* v. *Porter,* 157 F. 2d 410, 414 (C.A. 8, 1946). He protected the economy by damming at its source each inflationary trickle, which, if allowed to accumulate would have produced an overwhelmingly inflationary flood. At the same time he made certain that the innocent overcharger was not unjustly enriched to the disadvantage of his competitors. See *Woods* v. *Stone,* 333 U. S. 472 (1948). Having protected the economy against the inflationary and competitive consequences of innocent or inadvertent overcharges, the Price Administrator considered the matter closed. He did not invoke any of the punitive sanctions, for there was no occasion to do so. To borrow the felicitous language of Judge Learned Hand, the Administrator "did not believe that it paid to sweep into the same pool with wilful or careless violators, violators for whom the daedalian mazes of the regulations had proved too

---

[13] See Davis, *Administrative Rules-Interpretative, Legislative, and Retroactive,* 57 *Yale L. J.* 919, 936 (1948). ". . . (U)sages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." *United States* v. *McDaniel,* 7 Pet. 1, 14(1833).

much." *Jerry Rossman Corporation* v. *Commissioner, supra,* at 714.

3. The 1944 Amendment to Section 205(e) of the Price Control Law

The Administrator's practice assumes still greater significance in view of the action taken by Congress on S. 1764. That bill as finally enacted limited damage payments to the face amount of the overcharge where the defendant proved that the violation was neither "wilful nor the result of failure to take practicable precautions."[14] The 1944 amendment clearly ratified and codified the Administrator's sharp distinction between the return of the overcharge and the payment of any damages beyond the overcharge. At the same time it subjected the Administrator's practice to judicial supervision. The Administrator's practice and the amendment of 1944 clearly indicate "that in cases where the Administrator accepted the overcharge as sufficient," the allowance of a deduction would "not 'frustrate' any 'sharply defined' policies of the Emergency Price Control Act of 1942." *Jerry Rossman Corporation* v. *Commissioner, supra,* at 714.

The legislative history of the 1944 amendment reveals, in extraordinary detail, Congress' complete understanding and approval of the underlying administrative policy. In the *Rossman* case the Second Circuit relied upon this policy, as well as the 1944 amendment, in concluding that a returned overcharge was deductible. As the opinion explained, "Congress showed in 1944 by the amendment of §205(e) that it agreed with the Administrator." *Id.* at 714. The amendment of 1944 is even more pertinent and controlling here. In the *Rossman* case the settlement with O.P.A. was governed by the Price Control Act before it was amended in 1944. In this case the settlement was governed by the Act as amended in 1944.

---

14 Section 108(b) of the Act of June 30, 1944, 58 Stat. 640 (1944), 50 U.S.C.A. App. §925(e) (1944).

As we have seen, Section 205(e) of the Emergency Price Control Act, as originally enacted in 1942, authorized the consumer or, when he was barred from suit, the O.P.A. Administrator to sue for $50 or for "treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."[15] In 1944 the Senate Committee on Banking and Currency, after hearings, reported out S. 1764.[16] That bill would have authorized courts, in their discretion, to award one and a half times the amount of the overcharge "where violations occurred unintentionally and despite the exercise of due diligence to prevent them."[17]

This Senate bill and a companion bill introduced in the House of Representatives[18] were drastically amended in the course of floor debate. Accordingly, that extensive debate, rather than the Committee Reports, reflects the Congressional understanding of the legislation ultimately enacted as Section 108(e) of the Stabilization Extension Act of 1944.[19] The debate fully establishes that Congress did not consider the payment of the overcharge as the payment of a penalty.

In the early stages of the debate on S. 1764 Senator Lucas offered an amendment confining treble damage liability to sellers who "knowingly" overcharged. It was Senator Lucas' view that individuals making an honest mistake "*should not be penalized* in a suit in the Federal court for treble damages, either by the buyer or by the Administra-

[15] 56 Stat. 23, 34 (1942).

[16] *Hearings Before the Senate Banking and Currency Committee* on S. 1764, 78th Cong., 2d Sess. (1944); Sen. Rep. No. 922, 78th Cong., 2d Sess. (1944). See also Section 7, H.R. 4941, 78th Cong., 2d Sess. (1944).

[17] Sen. Rep. No. 922, 78th Cong., 2d Sess. (1944) 13-14.

[18] H. R. 4941, 78th Cong., 2d Sess. (1944).

[19] 58 Stat. 632, 640 (1944), 50 U.S.C.A. App. §925(e) (1944). The full debate appears in 90 Cong. Rec. 5375-5384, 5435-5451, 5886-5887 (1944).

Informed Congressional discussion of pending legislation is, of course, highly relevant in determining the policy and scope of a statute. *Helvering* v. *Griffiths*, 318 U.S. 371, 380-387 (1943); *United States* v. *Lovett*, 328 U.S. 303, 308-310 (1946); *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106 (1948).

tor.'' 90 Cong. Rec. 5376 (1944). (Italics supplied.) The floor representative of the Senate Committee, in defending the Committee's recommendation against Senator Lucas' proposed amendment, made it quite clear that there was a vital difference between the seller's mere return of the overcharge, which prevented ''unjust enrichment,'' and the payment of an amount beyond the overcharge, which had the features of a penalty.

> ''Mr. RADCLIFFE . . . Suppose there is an overcharge; let us suppose it is made innocently . . . certainly the seller should not pocket it. If an article should be sold for $25 but the dealer actually sells it for $60, no matter how innocent he may be, should he be entitled to pocket the $35, if he acted contrary to law and regulations? *There is no justification in the world for such unwarranted profits. So any way we look at it the amount of the overcharge has to be returned. I care not whether it was made wilfully and knowingly or not. the seller has money to which he is not entitled . . . certainly no overcharge should be pocketed and retained by the seller irrespective of whether or not he obtains it in good faith.*
>
> ''*There can be no justification in the world for that. The only question is whether there shall be any penalty.* What we have done in this case is to fix a minimum penalty, adding 50 percent to the amount of the overcharge, which is, after all, a very mild punishment, and one which, I feel, we must provide under the circumstances. Otherwise, we can conceive of a situation of a man taking chances and then going into court and saying, 'I can probably demonstrate to the court that it was done innocently, and therefore at the most I shall be obliged to return only the money which is determined to be the overcharge.' If we insert the words 'wilfully and knowingly,' we open up the courts to many cases of that kind. In normal times that might be proper, but if we are to undertake to execute a law which should be enforced, it seems to me that *a moderate penalty, 50 percent in addition to the overcharge, is reasonable.*
>
> ''Mr. LUCAS. On what theory should an honest individual be penalized, even in time of war?

> "Mr. RADCLIFFE. Whether the person is innocent or not, if there is a rule or regulation put into operation by the O.P.A. which provides that an article should be sold for $50 and he sells it for $75, should he be entitled to put the $25 in his pocket as *unjust enrichment?*
>
> "Mr. LUCAS. No; and under this provision, if I read it right, the court would have the power to compel him to pay the $25 back. What I object to is letting anyone collect treble damages." 90 Cong. Rec. 5377-5378 (1944). (Italics supplied.)

During the debate Senator Taft made a similar sharp distinction between an overcharge and a penalty:

> "We modified the original provision for three times the overcharge and made it one and one-half times so that *there would be a penalty amounting to 50 percent of the overcharge.* The penalty was to be imposed because the violator had not done right. It is very difficult to prove a man's wilful violation, and if there is no incentive to comply with the law he may not bother to comply with it. I think it will be very difficult to make any use whatever of this damage section if the word 'wilful' is made a part of it. I believe that the amount of $50 might be modified. As I see it now, there is no great objection to one and one-half times the overcharge as being a compulsory fine. *That means he has to pay back the overcharge and 50 percent more as a penalty for having violated the price administration law.*" 90 Cong. Rec. 5383 (1944). (Italics supplied.)

Before Senator Lucas' amendment to S. 1764 could be adopted, Senator Chandler proposed an alternative amendment which would require a seller-defendant to prove that his violation was neither wilful nor the result of failure to take practicable precautions against occurrence of the violation. 90 Cong. Rec. 5382 (1944). The seller who sustained the burden of proof proposed by Senator Chandler would have a complete defense in a civil action. Senator Lucas was impressed by the wisdom of Senator Chandler's proposal that the defendant should sustain the burden of

proving innocence. But evidently Senator Lucas had also been impressed by Senator Radcliffe's explanation of the difference between unjust enrichment and penalties. Accordingly, before accepting Senator Chandler's proposal, Senator Lucas asked Senator Chandler to revise his amendment in order to ensure that even an innocent or inadvertent violator would at least return the amount of the overcharge. The conclusion of the debate in which Senator Lucas and Senator Chandler reached a meeting of the minds clearly demonstrates that under the so-called Chandler amendment to S. 1764, as modified by Senator Lucas' caveat, (1) no penalty was to be imposed upon the innocent or inadvertent overcharger who paid over his excess intake either to the consumer or to the Government, and (2) a penalty in the form of extra damages was imposed on the reckless or wilful overcharger:

> "Mr. LUCAS . . . Every individual who knows anything about the average merchant of this country is convinced that 95 percent of the merchants are honest, sincere, and patriotic citizens and are attempting to comply in every way with the prosecution of the war effort. There may be 5 percent, perhaps, who are willing to cheat and chisel in connection with the interpretation of the rules and regulations of the O.P.A. I have no time for that unlawful group; *but it seems to me that the individuals attempting to obey the law through legal advice and counsel and through constant study of regulations which are constantly flowing from the O.P.A. office in Washington as well as the regional offices throughout the country ought to be protected to the limit.*
>
> ". . . Of course, if I should withdraw the amendment and the amendment of the Senator from Kentucky should be adopted, it would simply mean that the rule of the burden of proof would be shifted with respect to the proof of what is wilfully and what is knowingly done in violation of the act. The burden of proof is always on the individual who alleges it, but under the Chandler amendment we would place the burden of proof upon the seller to show that the violation is not wilful or was not done in a knowing manner.

"It is my understanding also that the amendment offered by the junior Senator from Kentucky in nowise provides that if the buyer or Administrator brings a suit and the seller's defense is that he did not wilfully or knowingly violate any order or any provision of the O.P.A. Act he is then relieved of any damages whatsoever and he also has a right to any overcharge. Am I correct in that?

"Mr. CHANDLER. That is correct.

"Mr. LUCAS. I thank the Senator. I may suggest to him that I believe if I should abandon my amendment, *there ought to be a provision in his amendment whereby the overcharge should be returned either to the buyer or to the Administrator.*

"Mr. CHANDLER. *I have no objection to that,* because in the cases I mentioned the overcharge was paid back promptly. Those who have made the overcharges want to pay them back.

"Mr. LUCAS. Mr. President, I think that under the circumstances, and in view of the fact that I am a strong advocate of this type of legislation as an anti-inflationary measure, I shall withdraw the amendment, but this debate should forcibly draw the attention of those administering this act to the necessity of the utmost fair dealing with merchants who are making every effort to comply with the law. *These men and women should not be unduly harassed or disturbed when such violations occur.* I am convinced that in the main the great majority of enforcement officers are trying to do what is right. There are always a few who make trouble for all. They should be eliminated when discovered, whether they are found in the field or in the office in Washington, D. C." 90 Cong. Rec. 5383-5384 (1944). (Italics supplied.)

On the day following this significant debate, June 7, 1944, the Senate passed the Chandler amendment, modified to incorporate Senator Lucas' suggestion:

"It shall be an adequate defense to any suit or action . . . if the defendant proves that the violation of the regulation, order, or price schedule prescribing a maximum price or maximum prices was neither wilful

> nor the result of failure to take practicable precautions against the occurrence of the violation.'' 90 Cong. Rec. 5645 (1944).

The Chandler amendment further provided that: ''Nothing in this section shall be construed to deprive the courts of the power to assess against the defendant the amount of the overcharge.'' *Ibid.* See also 90 Cong. Rec. 5435, 5450-5451 (1944). The Chandler amendment was incorporated in S. 1764 as passed by the Senate and sent to the House on June 9, 1944. 90 Cong. Rec. 5645 (1944).

On June 13, 1944, the House of Representatives began to consider H. R. 4941 and S. 1764 as it came to the House from the Senate. Early in the debate Congressman Sumner offered an amendment to H. R. 4941 which provided that damages should be ''not more than . . . treble the amount of the overcharge.'' 90 Cong. Rec. 5882 (1944). This provision survived the House debate, was accepted by the Conference Committee Report,[20] and was ultimately incorporated in the bill as enacted.

During the House debate Congressman Goodwin offered, and the House approved, a further amendment to H. R. 4941 which was similar to the Chandler amendment. 90 Cong. Rec. 5886, 5887 (1944). The Goodwin amendment provided, in effect, that the simple overcharge would be the maximum recovery where the violation was neither wilful nor the result of failure to take practicable precautions. The House debate on the Goodwin amendment was along the same lines as the Senate debate on the Chandler amendment. Congressman Goodwin explained his amendment as follows:

> ''The amendment puts the burden of proof on the defendant and is unique in that respect. There is no presumption of innocence in his favor. He must go forward. But if he satisfies the court with his statement of the case the judge may say to him, '*I believe you are an honest merchant who has acted in good faith. I am not going to put upon you the stigma of a penalty.*'

* * * * * * *

[20] H. R. Rep. No. 1698, 78th Cong., 2d Sess. (1944) 10, 23, 24.

> "This amendment does not protect the wilful violator of the regulations or the man who fails to take reasonable precautions, and that man deserves no protection. *It does seek to protect the merchant who, in good faith, does all he reasonably can to cooperate, and he ought to be protected.*
>
> "The amendment leaves this bill thoroughly effective against the dishonest merchant and the chiseler, *but protects the honest merchant from being penalized for an honest mistake.*" 90 Cong. Rec. 5886 (1944). (Italics supplied.)

Congressman Murphy, supporting the Goodwin amendment, stated that the amendment "had for its purpose freeing merchants of *punitive damage* liability in consumer civil suits if they could show the overcharges were unintentional." 90 Cong. Rec. 5887 (1944). (Italics supplied.) Finally Congressman Gwynne, who also supported the Goodwin amendment, stated:

> "What is the situation today? If you violate some regulation, even though the violation may be technical and minor, they can bring you into court and, regardless of your carefulness and regardless of your lack of wilful intent, punish you for violation of the regulation.
>
> "What does this amendment do? The law would be the same, the procedure would be the same, except that when the defendant was brought into court charged in this quasi-criminal action he would be allowed to prove, if he could prove it, two things: First, that he had not acted wilfully, and second, that he had not been negligent in taking practicable precautions against the occurrence of the violation. *In other words, if he could show that he had cooperated honestly, then he would be excused from the penalty but would be required to pay the overcharge.*" 90 Cong. Rec. 5887 (1944). (Italics supplied.)

In the wake of this extensive and illuminating debate the Congress passed Section 108(e) of the Stabilization Extension Act of 1944, which provided that the seller would be liable for "not more than three times the amount of the

overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, . . . *Provided, however,* That such amount shall be the amount of the overcharge or overcharges . . . whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation . . ." 58 Stat. 632, 640-641 (1944), 50 U.S.C.A. App. §925(e) (1944).

In the present case the petitioner returned the overcharges after the enactment of the 1944 amendment and pursuant to its provisions. The *Rossman* decision, fortified by the legislative history which we have just outlined, directly and solidly sustains the petitioner's contention that it is entitled to deduct the overcharge payment. Again and again, as we have seen, the legislative debate plays upon the theme that the return of an overcharge is not a penalty and that only a payment in addition to the overcharge has penal aspects. Even if the petitioner paid an amount in addition to the overcharge, it is certainly entitled to deduct the overcharge itself.[21] As Judge Hand's opinion points out, "recovery of three times the overcharge is no less a recovery of the overcharge because it includes the penalty along with it. Hence, if the taxpayer had been able to distribute the overcharge to the 'terminal buyers,' and had done so, the distribution would have been deductible . . . the Administrator's claim, like the 'terminal buyer's' claim for which it is a substitute, is also made up of the overcharge and an addition of twice its amount . . ." 175 F. 2d at 712.[22]

[21] The non-penal nature of the overcharge payment is not affected by any payment beyond the amount of the overcharge. Every state imposes a number of taxes, and, in addition, imposes penalties upon those who neglect to pay their taxes. The Internal Revenue Code authorizes the deduction of tax payments to the states just as the *Rossman* decision permits the deduction of overcharge payments to O.P.A. Obviously the taxpayer does not lose his deduction for taxes paid merely because he pays an additional penalty for failing promptly to pay his taxes. Just as the tax remains a deductible tax, so the overcharge remains a deductible overcharge—even though an additional amount may be paid as a penalty.

[22] In fact, Judge Hand points out that it is by no means "absolutely certain" that the payment of the addition is the payment of a penalty—although he so assumes for the purposes of the *Rossman* decision. 175 F. 2d at 712.

B. The Court Decisions Do Not Sustain the Commissioner's Contention That Overcharge Payments Are Non-Deductible Penalties.

There are a number of judicial statements as to the nature of the Administrator's treble damage action under Section 205(e) of the Emergency Price Control Act which the Government may invoke in these proceedings. For example, some Federal courts have characterized the treble damage action as penal in barring the O.P.A. Administrator's treble damage actions against survivors of the alleged violator. See, e.g., *Bowles* v. *Farmers' National Bank of Lebanon, Ky.,* 147 F. 2d 425 (C.A. 6, 1945); *Porter* v. *Elliott,* 69 F. Supp. 652 (E.D. Pa. 1946), *aff'd sub nom Fleming* v. *Elliott,* 163 F. 2d 215 (C.A. 3, 1947); *Porter* v. *Montgomery,* 163 F. 2d 211, 215 (C.A. 3, 1947); *United States* v. *Murray,* 75 F. Supp. 216 (D. C. N. H., 1947).

But there is an equally imposing array of opinions which indicate that the Administrator's action is remedial and not penal in nature. In *Kessler* v. *Fleming, supra,* at 468, this Court declined to embrace the rationale of the Sixth Circuit in *Bowles* v. *Farmers' National Bank, supra.* This Court took "the view that the treble damage sanction is remedial rather than punitive." *Kessler* v. *Fleming, supra,*[23] at 468. The *Kessler* opinion cited with approval an Eighth Circuit decision which stated that:

> "The provision for the [Administrator's] recovery of the overcharges themselves as damages is purely a remedial and hence a civil sanction there can be no possible doubt. And there can be but little more question that the provision for increasing or multiplying the overcharge-damages equally was intended to be simply remedial and not forfeitively punitive in nature." *Crary* v. *Porter, supra,* at 413-414.

As the Tenth Circuit declared in *Amoto* v. *Porter,* 157 F. 2d 719, 722 (C.A. 10, 1946):

> "Considering the declared purposes of the Act and the interest of the Government in its enforcement, an action

[23] Compare this Court's opinion in *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431 (C.A. 9, 1946).

> for the imposition of the sanctions authorized is remedial and not penal in nature. . . .''

Of course, what is a penalty where the survival of an action is concerned is not necessarily a penalty where the Rules of Civil Procedure are applied, as in the *Kessler* case. By the same token the decisions on these diverse non-tax questions are not conclusive here. What is a penalty where survival is involved is not necessarily a penalty where taxation is involved. ''A definition given for such an issue is not controlling in this dissimilar inquiry.'' See *Higgins v. Commissioner,* 312 U.S. 212, 217 (1941).[24] Indeed, as the O.P.A. decisions illustrate, the word ''penalty'' is one of those ''chameleon'' terms ''which reflect the color of their environment.'' See *Commissioner v. National Carbide Corporation,* 167 F. 2d 304, 306 (C.A.2, 1948), *aff'd,* 336 U.S. 422 (1949). Like ''cause of action,'' it ''may mean one thing for one purpose and something different for another.'' See *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62, 67, 68 (1933). For ''the words 'penal' and 'penalty' have many different shades of meaning, and are in fact among the most elastic terms known to law.'' *Ward* v. *Rice,* 29 F. Supp. 714, 715 (E.D.Pa., 1939).

The basic issue in this case has been framed by the Supreme Court in *Commissioner v. Heininger, supra.* The question is whether the deduction of the alleged overcharges which were turned over to the Government would frustrate any ''sharply defined'' Congressional or administrative policy toward overcharges. The legislative and administrative materials which we have set forth manifestly indicate that the return of alleged overcharges was not a penalty and that the deduction of the amount returned would not frustrate the national price control policy. The prime objective of the law requiring an overcharger to surrender his overcharge to the consumer or to the Administrator was to remove the overcharge from circulation and to return the overcharger to *status quo.*

---

[24] See also *Helvering* v. *Hammel,* 311 U. S. 504, 507 (1941); *Helvering* v. *Northwest Steel Rolling Mills,* 311 U. S. 46, 50-51 (1940); *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 87 (1934); *Burnet* v. *Guggenheim,* 288 U. S. 280, 287, 289 (1933).

C. Petitioner's Payment of the Overcharge Was An Ordinary and Necessary Business Expense

The Commissioner's rulings and the Tax Court's decisions plainly imply that, apart from public policy considerations, petitioner's payment of alleged overcharges to the O.P.A. was an ordinary and necessary business expense. Clearly the payment was "directly connected with" and "proximately resulted from" the petitioner's business. See *Kornhauser v. United States*, 276 U.S. 145, 153 (1928). The payment may have been "unique in the life of the individual . . . but not in the life of the group, the community of which he is a part." *Welch* v. *Helvering*, 290 U.S. 111, 114 (1933).

The Fifth Circuit has said that "the revenue laws of the United States are not over-squeamish." *Alexander Gravel Co. v. Commissioner*, 95 F. 2d 615, 616 (C.A. 5, 1938). Perhaps this generalization reaches too far in other contexts. Compare *United States v. Sullivan*, 274 U.S. 259 (1927), with *Commissioner v. Wilcox*, 327 U.S. 404 (1946).[25] But undoubtedly it is now a fact of business life, particularly in wartime, that the greatest effort and impeccable good faith are frequently insufficient to insure perfect compliance with complicated regulatory laws.[26] In our extremely complex modern business world, swarming with rules and regulations, violations are practically inevitable though intentions are the most honorable. The Emergency Price Control Act was the crowning illustration of the overwhelming complexity of business regulations. "The body of regulations, by which the United States sought to control prices during the last war, was extraordinarily complicated and difficult to comprehend. That was inevitable; the innumerable varieties of commercial transactions to be covered made possible nothing simpler." It became the business of every businessman to find his way, at his peril, through "the daedalian mazes" of statutes, regulations, orders, instructions, and forms. *Jerry Rossman Corpora-*

---

[25] See also *Commissioner* v. *Heininger, supra.*

[26] With respect to the Price Control Law see, e.g., *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944).

tion v. Commissioner, supra, at 714.[27] Legal differences with the Government became an ordinary, everyday hazard of doing business. Expenses born of such commonplace hazards are easily "ordinary and necessary" according to the "generally accepted meaning of the language." See *Commissioner v. Heininger, supra,* at 472, 473.

D. The Penalty Doctrine Should not be Extended To This Case

We have pointed out that neither Congress nor the Administrator regarded the return of an overcharge as a penalty. In fact, they affirmatively indicated that the return of an overcharge was not a penalty.[28] In addition, Section 23(a) of the Code does not proscribe the deduction claimed. See *Commissioner v. Heininger, supra,* at 473-74. Nevertheless the Commissioner disallows the deduction by invoking the so-called penalty doctrine, which has been applied by the lower Federal courts "from time to time" in disallowing the deduction of certain fines and penalties. *Id.* at 473.

As the Supreme Court has succinctly stated, "What class of outlays may, in relation to the federal income tax, be deducted from gross income and in what amount are matters solely for Congress." *McDonald v. Commissioner,* 323 U.S. 57, 59 (1944). Despite this fundamental principle the Commissioner and some courts have evolved the penalty doctrine without the benefit of any specific legislative command or any authoritative Treasury regulation.[29] *Great*

---

[27] Even leading officials of O.P.A. have recognized the unbelievably complicated character of the wartime price control regulations and the high probability of honest misunderstanding. See *Cavers, Simplification of Government Regulations,* 8 Fed. Bar J. 339 (1947).

[28] See pp. 8-18, *supra.*

[29] Treasury Regulations 111, Sec. 29.23(a)-1, provide that "Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income." The Regulations are conspicuously silent on the general subject of fines and so-called penalties. As the Supreme Court observed in the *Heininger* case, "In determining this issue we do not have the benefit of an interpretative departmental regulation defining the application of the words 'ordinary and necessary' to the particular expenses here involved." *Id.* at 470. *Cf. Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326, 338.

For a critical analysis of the penalty doctrine, see Note, 54 Harv. L. Rev. 852 (1941).

Northern Ry. Co. v. *Commissioner*, 40 F. 2d 372 (C.A. 8, 1930), *cert. denied*, 282 U.S. 855 (1930); *Burroughs Building Material Co.* v. *Commissioner*, 47 F. 2d 178 (C.A. 2, 1931); *Chicago, Rock Island & Pacific Ry. Co.* v. *Commissioner*, 47 F. 2d 990 (C.A. 7, 1931), *cert. denied*, 284 U.S. 618 1931); *Helvering* v. *Superior Wines & Liquors*, 134 F. 2d 373 (C.A. 8, 1943); *Commissioner v. Longhorn Portland Cement Co.*, 148 F. 2d 276 (C.A. 5, 1945), *cert. denied*, 326 U.S. 728 (1945);[30] *Bonnie Bros.* v. *Commissioner*, 15 B.T.A. 1231 (1929).

Neither this Court nor the Supreme Court has ever held that the payment of a fine or a penalty, which otherwise qualifies as a business expense, is not deductible. Indeed, this Court's decision in *Helvering* v. *Hampton*, 79 F. 2d 358 (C.A. 9, 1935), reflects a determination to control the Commissioner in his efforts to rove at large beyond the confines of statute and regulation. Moreover, the reasoning and thrust of the Supreme Court's decision in *Commissioner* v. *Heininger, supra*, suggest disapproval of the Commissioner's iron-clad rule disallowing the deduction of any and all payments to the Price Administrator without regard to the underlying price control policy. Finally, the Court of Appeals for the Second Circuit, which was one of the principal architects of the penalty doctrine, has refused to extend its own rulings so as to disallow the deduction of an overcharge returned to the Government.[31]

---

[30] In *Longhorn Portland Cement Co.* v. *Commissioner, supra*, and *Burroughs Building Material Co.* v. *Commissioner, supra*, penalties and fines were paid to state governments. Public policy considerations not present here were therefore the sole determining factors in those cases.

[31] The Second Circuit's decision in *Jerry Rossman Corporation* v. *Commissioner, supra*, carefully distinguished that Court's prior decisions in *Burroughs Building Material Co.* v. *Commissioner, supra; Gould Paper Co.* v. *Commissioner*, 72 F. 2d 698 (C.A. 2 ,1934); *National Outdoor Advertising Bureau* v. *Helvering*, 89 F. 2d 878 (C.A. 2, 1937).

The Second Circuit's opinion in the *Rossman* case did not cite *Commissioner* v. *Longhorn Portland Cement Co., supra.* But a few months before deciding the *Rossman* case, the Second Circuit affirmed the Tax Court *per curiam* on the authority of the *Longhorn* case. *Universal Atlas Cement Company* v. *Commissioner*, 171 F. 2d 294 (C.A. 2, 1948).

In the *Heininger* case the Supreme Court noted that the Commissioner and the lower courts have "narrowed the generally accepted meaning of the language" authorizing the deduction of ordinary and necessary business expenses "in order that tax deduction consequences might not frustrate sharply defined national and state policies proscribing particular types of conduct." *Id.* at 473. But at the same time the Court emphasized that "the language of 23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." *Id.* at 474. We do not suggest that the silence of the revenue statutes should necessarily foreclose a sensible judicial interpretation of Section 23(a) in the public interest as reflected in other statutes. But a re-examination of the pioneer decisions on the penalty principle reveals its very slender foundation. *Great Northern Ry. Co.* v. *Commissioner, supra.* Moreover, as variously applied and not applied, the principle has produced very curious results.

The penalty doctrine was initially established in *Great Northern Ry. Co.* v. *Commissioner, supra.* In that case the United States had assessed lump sum penalties against the taxpayer for violations of the Safety Appliances Act[32] and the Hours of Service Law,[33] among others.[34] The company sought to deduct these penalty payments as "ordinary operating expense." *Id.* at 373. The Court of Appeals for the Eighth Circuit conceded that the expenses "arose in connection with the operations of the road," but, the Court also observed, "they arose entirely from unlawful operation, prohibited specifically by statutes and regulations." Then, without attempting to support its conclusion from legislative language or history, the Court decided that: "*It cannot be* that Congress intended the carrier should have any advantage, directly or indirectly, or any reduc-

---

[32] 36 Stat. 299 (1910), 45 U.S.C.A. §13. See note 45, *infra.*

[33] 39 Stat. 722 (1916), 45 U.S.C.A. §66. See note 45, *infra.*

[34] See 8 B.T.A. 225, 234, 263-265 (1927), *aff'd* 40 F. 2d 372, (C.A. 8, 1930), *cert. denied,* 282 U. S. 855 (1930).

tion, directly or indirectly, of these penalties." *Ibid.* (Italics supplied.)

The Second Circuit's decision in *Burroughs Building Material Co.* v. *Commissioner, supra,*—based, in part at least, upon the *Great Northern* precedent rather than Congressional direction—marked the second significant chapter in the judicial evolution of the penalty doctrine. A corporation and its president had pleaded guilty to an indictment charging violation of New York state laws prohibiting price-fixing agreements. The corporation sought to deduct the fines it had paid on behalf of itself and its president as well as attorneys' fees incurred in the criminal proceedings. Drawing what was conceded to be an "arbitrary line" between civil tort actions and criminal proceedings which involve no moral turpitude, the Court held, with apparent hesitation, that the fines were not deductible. 47 F. 2d at 180.[35] Moreover, said the Court, "If the fines and costs cannot be deducted, the legal expenses incurred in litigating the question whether the taxpayer violated the law and whether fines should be imposed should *naturally* fall with the fines themselves." *Ibid.* (Italics supplied). The Court concluded that it could not "sanction expenditures of such a character . . . on grounds of public policy." *Ibid.*

More recently the Second Circuit has dealt with the deductibility of counsel fees incurred in resisting a Government civil action. *National Outdoor Advertising Bureau* v. *Helvering*, 89 F 2d 878 (C.A. 2, 1937).[36] In this opinion the previous conclusions with respect to the penalty doctrine were re-examined and re-affirmed. The Court decided

---

[35] In *Burroughs Building Material Co.* v. *Commissioner, supra,* at 180, the Court emphasized that "It is not easy to distinguish such fines from expenditures incurred in connection with actions to recover for negligence or because of patent infringements, unless one draws an *arbitrary line* between criminal and civil actions even where the criminal actions relate to matters involving no moral turpitude. Undoubtedly expenditures which are in themselves immoral, such as for bribery of public officials to secure protection of an unlawful business would not have to be allowed in order consistently to justify a deduction of fines paid for violations of law involving no moral turpitude and practically inevitable." (Italics supplied).

[36] In accord: *Gould Paper Co.* v .*Commissioner, supra.*

that the same considerations of public policy which proscribed the deduction of fines and related expenses made non-deductible fees paid for defense against a Federal anti-trust injunction. As the Court restated the rationale of the *Burroughs* case, fines and legal expenses are not " 'necessary' " because "the law will not recognize the necessity of engaging in illegal courses in the conduct of a business. . . . (I)t is never necessary to violate the law in managing a business. . . ." *National Outdoor Advertising Bureau* v. *Helvering, supra,* at 881.

The Supreme Court granted certiorari in *Commissioner* v. *Heininger, supra,* to resolve an asserted conflict between the decision of the Seventh Circuit Court of Appeals in that case and the Second Circuit's decision in the *National Outdoor Advertising Bureau* case. *Commissioner* v. *Heininger, supra,* at 470. The Supreme Court affirmed the Seventh Circuit, holding that legal fees incurred in an unsuccessful attack upon a postal fraud order were deductible. Perhaps the *Heininger* case did not overturn the *National Outdoor* decision in all its aspects. However, the *Heininger* decision certainly repudiated the theory that "public policy" requires the blanket disallowance of all expenses arising out of violations of law litigated by the Government. And the Second Circuit, along with others,[37] had squarely held that the same considerations of public policy which forbid the deduction of fines and penalties forbid the deduction of related expenses. Strictly speaking, the *Heininger* case may not have decided more than the precise issues presented by the facts. But that opinion abstains from any meticulous distinctions between legal expenses and fines or penalties. In its discussion of public policy, cases on expenses and cases on fines and penalties freely intermingle. 320 U.S. at 473, note 8. The opinion emphasizes that an otherwise deductible business outlay is not to be disallowed under the income tax law unless its allowance "would frustrate" some "sharply

[37] See, e.g., *Helvering* v. *Superior Wines & Liquors, supra,* and *Burroughs Building Material Co.* v. *Commissioner, supra.*

defined'' policy deriving from some other source. *Id.* at 474. Finally, it indicates that a penalty incurred in business like other outlays incurred in business, is also deductible if the ''tax deduction consequences might not frustrate sharply defined'' policies ''proscribing particular types of conduct.'' *Id.* at 473.

Hence whether the deduction in question is a fine, penalty or legal fee, no court is ''required to regard the administrative finding of guilt'' as ''a rigid criterion" of ''deductibility.'' *Commissioner* v. *Heininger, supra,* at 475. The mere fact that a payment is made because of a legal transgression is no longer controlling. To the extent that the ''penalty doctrine'' cases held otherwise they have been authoritatively overruled. *Ibid.* As the Second Circuit has nicely summarized the matter, ''whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends upon the place of sanctions in the scheme of enforcement of the underlying act . . . in short . . . there are 'penalties' and 'penalties,' and . . . some are deductible and some are not.'' *Jerry Rossman Corporation* v. *Commissioner, supra,* at 713.

It seems clear, therefore, that the penalty doctrine does not apply here. In the first place, the return of the overcharge was not devised as a penalty and did not serve as a penalty. Secondly, even if for some reason the return of the overcharge were deemed a penalty, its place in the scheme of enforcement demonstrates that the deduction would not ''frustrate'' any ''sharply defined'' policy of the Price Control Act. See pp. 8-18, *supra*.

In ultimate analysis the Government's view rests on the convenient notion that any payment to the Government in the enforcement of a statute is necessarily a penalty because of its deterrent effect. But any sanction imposed by law has a deterrent effect whether payment is made to the Government or to some individual. When legal transgressions occur, the same public policy is at stake no matter who invokes the law. The courts have uniformly held that

taxpayers may deduct damages paid to a private person in order to right a wrong committed in the operation of a business. It has been deemed immaterial whether the injury was caused by mere negligence, conspiracy, misrepresentation or violation of State or Federal statute. See *Howard* v. *Commissioner,* 22 B.T.A. 375 (1931); *International Shoe Co.* v. *Commissioner,* 38 B.T.A. 81, 95 (1938). See also *Foss* v. *Commissioner,* 75 F. 2d 326 (C.A. 1, 1935); *Kornhauser* v. *United States, supra* at 153. As this Court has said, "We cannot agree that private wrongdoing in the course of business is extraordinary. . . ." *Helvering* v. *Hampton, supra,* at 360. In short, legal transgressions are quite ordinary business hazards. *Cf. Welch* v. *Helvering, supra,* at 114-115.

Obviously, whether a payment is a penalty depends upon the setting and consequences of the payment. Even the Commissioner has refrained from applying any wooden rule that any payment to the Government is necessarily a penalty. For example, the Agricultural Adjustment Act of 1938 authorized the imposition of farm marketing quotas. Section 314 of that Act subjected every farmer who marketed for example tobacco products in excess of the quota to a sanction specifically called a "penalty," measured by the value of his sales beyond the allotted quota. 52 Stat. 48 (1938), 7 U.S.C.A. §1314 (1939). The Bureau has ruled that such "penalties" are deductible as ordinary and necessary business expenses. I.T. 3530, C.B. 1942-1, p. 43.[38]

The Commissioner's own rulings on returned overcharges are a revealing commentary on the mechanical notion that any payment to the Government in the enforcement of a

---

[38] The Agricultural Adjustment Act did not expressly characterize sales in excess of established quotas as unlawful, whereas the Price Control Law declared overcharging unlawful. Accordingly, it might be argued that this technical distinction destroys the force of the A.A.A. deduction analogy. But this distinction is at best very attenuated. It does not conceal the overriding design of the A.A.A. penalty to compel compliance with the established quotas. See, e.g., *Mulford* v. *Smith,* 307 U. S. 38, 41 (1939). The allowance of the tax deduction necessarily mitigated the impact of A.A.A. policy and the only sanction provided for its enforcement. Moreover, as we have pointed out, the return of overcharges is not the payment of a penalty.

legal sanction is necessarily a penalty. For on the basis of this notion the Commissioner has proceeded to impose strange and anomalous consequences which are not responsive to any rule of reason. See I.T. 3627, C.B. 1943, p. 111; I.T. 3799, C.B. 1946, p. 56. Section 4(a) of the Emergency Price Control Act made all overcharging illegal—whether the overcharge was ultimately returned to the consumer or to the O.P.A. The consumer action was no less designed as a deterrent than the civil action which the Administrator was authorized to bring. The rulings distinguishing a payment to a consumer from a payment to the Administrator rely entirely upon the "arbitrary"[39] distinction which the lower courts have drawn between actions instituted by the sovereign and actions instituted by private parties.[40] Under the Commissioner's rulings overcharges are deductible if they are paid to consumers, but identical overcharges are not deductible if they are paid to the Government. Nor is this anomaly less glaring when we note that the Commissioner permits a wilful overcharger to deduct a treble damage payment to a consumer while he prohibits the inadvertent overcharger from deducting the mere payment of the overcharge to the Government.

The present confusion is not alleviated by simply saying that the deductibility of payments made to consumers is not involved here.[41] The Commissioner has not only allowed the deduction of these payments. He has also allowed the deduction of legal fees incurred in defending suits by the Price Administrator or consumer—whether or not the de-

---

[39] See *Burroughs Building Material Co.* v. *Commissioner, supra,* at 180.

[40] See p. 25, *supra.* The fine distinction drawn by the Commissioner between the consumer's action and the Administrator's action is contradicted by the authoritative literature on O.P.A. policy. This Court has observed that "The purchaser plaintiff in bringing his action is the instrument in accomplishing the Congressional purpose of preventing inflation." See *Porter* v. *Crawford & Doherty Foundry Co., supra,* at 434-435. "This action is the people's remedy against inflation." Sen. Rep. 922, 78th Cong., 2d Sess. (1944) 13-14. In short, the buyer's civil action was no less—and no more—an enforcement weapon than the Administrator's parallel action.

[41] In *Scioto Provision Co., supra,* the Tax Court refused to undertake an analysis of the curious distinction drawn by the Commissioner. 9 T.C. at 445.

fense is successful.[42] Accordingly both these phases of the Commissioner's understanding of the penalty doctrine will never be squarely presented to the courts. But this situation should not foreclose an analysis of related aspects of the Commissioner's rules, where, as here, his rules supposedly derive from judge-made public policy which the Tax Court has affirmed. The administrative rulings based on the penalty doctrine reach arbitrary and irreconcilable results. If the penalty doctrine has been so administered as to be beyond repair by the courts which created it, the doctrine should be abandoned. In any event the doctrine should certainly not be extended to disallow the deduction of a payment which was not considered punitive by the authorities who collected it.

If the penalty doctrine is to survive, its scope should be reasonably circumscribed. In view of the illuminating legislative and administrative history, to which we have referred,[43] the mere fact that an overcharge was paid to the Government rather than the consumer is irrelevant in drawing the appropriate boundary lines. Moreover, the 1944 amendment, when appraised in the context of that history and the *Heininger* opinion, indicates that the return of an overcharge lies well beyond these lines. For in requiring the return of the overcharge Congress did not impose a penalty, and in allowing the deduction of the overcharge the courts are not frustrating any sharply defined price control policy.[44]

E. Disallowance of Petitioner's Deduction Would Affirmatively Impose a Penalty

We have seen that the return of an overcharge to the Government is not a penalty so far as Price Control policy is concerned. There is a further reason why the penalty doctrine should not be extended to bar the deduction of an

[42] G. C. M. 24810, C.B. 1946-1, p. 55.

[43] See pp. 8-18, *supra*.

[44] See pp. 5-18, *supra*.

overcharge payment to the Government. As applied to such payments the doctrine would affirmatively inflict a penalty which Congress did not impose rather than mitigate a penalty which Congress had otherwise imposed.

We have already pointed out the important lesson of the *Heininger* case: the underlying statute whose alleged violation precipitates the questioned payment is the principal criterion in determining the deductibility of the payment. Each of the statutes involved in the cases fashioning the penalty doctrine required the violators to make lump sum payments of fines or penalties to the Government which bore no relation to their incomes. See, e.g., *Longhorn Portland Cement Co.* v. *Commissioner, supra.*[45] The taxpayers'

---

[45] Longhorn Portland Cement Co. settled a complaint charging violation of the Texas anti-trust statute. Article 7436 of that statute, 20 Tex. Civ. Stat. Art. 7436 (Vernon, 1929), provided that "Each . . . corporation or association . . . who shall in any manner violate any provision of this subdivision *shall, for each day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the State of Texas.*" *Longhorn Portland Cement Co.* v. *Commissioner,* 3 T.C. 310, 311 (1944), *rev'd in part,* 148 F. 2d 276 (C.A. 5, 1945), *cert. denied,* 326 U. S. 728 (1945).

Superior Wines & Liquors, Inc. settled administratively an alleged violation of Section 2857 of the Internal Revenue Code. That Section and its supporting regulations require liquor dealers to maintain certain records. The Section further provides that "every . . . dealer who refuses or neglects to keep . . . records in the form prescribed by the Commissioner . . . shall pay a *penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000 and be imprisoned not less than three months nor more than three years.*" *Helvering* v. *Superior Wines & Liquors, supra,* at 373-374. Superior paid $2,250 in settlement. This sum can only be allocated as $100 penalty and $2,150 fine.

The Burroughs Building Material Co. pleaded guilty to an indictment drawn under Section 341 of the General Business Law of New York. 19 Consol. Laws, N.Y. §341 (McKinney, 1941). *Burroughs Building Material Co.* v. *Commissioner, supra,* at 178. That Section provided that every corporation convicted pursuant to that statute "is guilty of a misdemeanor" and shall be punished "*by a fine of not exceeding twenty thousands dollars.*" Burroughs paid a fine of $2,500.

The Chicago, Rock Island & Pacific Railway had violated the Federal Safety-Appliance Law, the Hours of Service Law, the Transportation of Live Stock Law, and the Quarantime Law. *Chicago, Rock Island & Pacific Ry.* v. *Commissioner, supra,* at 991.

The Safety Appliance Law provided that "any common carrier . . . hauling . . . any car in violation of any of the preceding provisions of this chapter, *shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States . . .*" 27 Stat. 532 (1893), 29 Stat. 85 (1896), 45 U.S.C.A. §6 (1943). See also 36 Stat. 299 (1910), 45 U.S.C.A. §13 (1943).

The Hours of Service Law provided that "Any person violating any provision of section 65 of this title *shall be guilty of a misdemeanor and upon conviction*

unlawful conduct did not increase their intake by any specific amount. In appraising the demands of public policy, the courts in those earlier cases evidently felt, therefore, that the deduction of amounts paid to the Government would enable violators to pay the Government with one hand and to offset their payment against their unrelated tax liability with the other.[46]

In contrast, the Price Control Act had a very real and direct relation to the taxpayer's income, for it limited the taxable income which might be lawfully received. If the taxpayer received an additional amount, he was obliged to return the excess to the Price Administrator or the consumer. The very transgression which yielded the excess required the taxpayer to return the excess. And, as we have seen, the obligation to return the overcharge was not the infliction of a penalty but a means of preventing unjust enrichment. Hence the taxpayer's business income is not truly and accurately reflected unless the returned overcharge is deducted as an amount received and paid over in the course of its business. *Cf. Commissioner* v. *Brown,* 54 F. 2d 563 (C.A. 1, 1931). The Supreme Court's admonition in *Higgins* v. *Smith,* 308 U.S. 473, 476-477 (1940), is especially appropriate here: "There is no illusion about the

---

shall be fined not less than $100 and not more than $1000, or imprisoned not to exceed one year, or both." 39 Stat. 722 (1916), 45 U.S.C.A. § 66 (1943).

The Transportation of Live Stock Law provided that "any railroad . . . who knowingly and wilfully fails to comply with the provisions of . . . this title *shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500.*" 34 Stat. 608 (1906), 45 U.S.C.A. §73 (1943). It was further provided that "The *penalty* created by section 73 of this title shall be recovered by civil action in the name of the United States in the district court . . . and it shall be the duty of United States attorneys to *prosecute* all violations of this chapter. . . ." 34 Stat. 608 (1906), 36 Stat. 1167 (1911), 45 U.S.C.A. §74 (1943).

The Quarantine Act concerning Nursery Stock provided that "Any person who shall violate any of the provisions of this chapter . . . shall be deemed guilty of a misdemeanor and *shall, upon conviction thereof, be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both,* . . ." 37 Stat. 318 (1912), 7 U.S.C.A. §163 (1939). See also Quarantine Act concerning Cattle and Poultry, 23 Stat. 32 (1884), 21 U.S.C.A. §117 (1927).

Violation of these same statutes gave rise to the payments in controversy in *Great Northern Ry.* v. *Commissioner, supra.* (Italics supplied.)

[46] See *Great Northern Ry. Co.* v. *Commissioner, supra; Chicago, Rock Island & Pacific Ry. Co.* v. *Commissioner, supra; Helvering* v. *Superior Wines & Liquors Co., supra.*

payment of a tax exaction. Each tax, according to a legislative plan, raises funds to carry on government. The purpose here is to tax earnings and profits less expenses and losses. If one or the other factor in any calculation is unreal, it distorts the liability of the particular taxpayer to the detriment or advantage of the entire tax-paying group.''

Indeed if the deduction is disallowed, as the Government contends, the taxpayer will be affirmatively penalized by the tax laws. For he not only surrenders the overcharge, but is then taxed on the overcharge as if it had never been surrendered. This penalty is inevitable in view of the Government's elastic attitude toward overcharges. The Government insists that it alone is entitled to the overcharge, which the taxpayer must return in order to prevent unjust enrichment. The Government also insists that the taxpayer is taxable on the overcharge, though he is obliged to pay it over to the Government as soon as he receives it. The Government then insists that the taxpayer may not deduct the overcharge though he was not entitled to the overcharge. Hence it is not surprising that the Government's view of the matter would subject the inadvertent overcharger to harsher treatment than an embezzler or thief. See *Commissioner* v. *Wilcox, supra.* One should be slow to attribute such strange tax consequences to Congress—especially if no tax statute requires these consequences.

In returning the overcharge the petitioner did not pay a penalty. Nor, as we have seen, would the deduction of the overcharge ''frustrate'' any ''sharply defined'' policy of the Price Control Act. The disallowance of the deduction would tax petitioner as if it were truly enriched, although taxation is an ''eminently practical'' matter, *Tyler* v. *United States,* 281 U.S. 497, 503 (1930), wisely concerned with economic substance. Instead of mitigating a penalty, the disallowance of the deduction would, as in the *Heininger* case, affirmatively ''attach a serious punitive consequence'' to the return of an overcharge, which overriding national policy did not devise as punishment. See *Commissioner* v.

Heininger, supra, at 474. If the tax laws do not mitigate penalties, neither do they impose penalties—at least until they expressly so provide.[47]

Respectfully submitted,

RANDOLPH E. PAUL,
1614 Eye Street, N. W.
Washington, D. C.

---

[47] *Cf.* Section 5(a), Stabilization Act of 1942, 56 Stat. 767 (1942), 50 U.S.C.A. §965(a). See note 7, *supra.*